Supreme Court, U.S.
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No. 98-66

In The

Supreme Court of the United States

October Term, 1997

DENISE M. KENNEDY,

Petitioner,

vs.

SCHOENBERG, FISHER & NEWMAN, LTD.
and ROBERT C. GOLDBERG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

The question presented for review by Petitioner Denise M. Kennedy ("Kennedy") does not accurately reflect the analysis and holding of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). Accordingly, Respondents Schoenberg, Fisher & Newman, Ltd. ("SF&N") and Robert C. Goldberg ("Goldberg") present the following properly framed question:

> Should the Supreme Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit affirming summary judgment in favor of Respondents, where Kennedy fails to articulate any basis for review by the Supreme Court and where resolution of Kennedy's request that the Supreme Court "define and/or clarify what constitutes direct evidence of discriminatory intent under Title VII" cannot change the outcome of this case?

RULE 29.6 STATEMENT

This brief is filed on behalf of Schoenberg, Fisher and Newman, Ltd., a law firm, and Robert C. Goldberg. Schoenberg, Fisher and Newman, Ltd. has no parent or subsidiary companies.

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42 U.S.C. § 2000e(k) 1

STATEMENT OF THE CASE

The Seventh Circuit affirmed the grant of summary judgment in favor of Respondents by the United States District Court for the Northern District of Illinois.[1] Respondents incorporate by reference the statement of facts in the Seventh Circuit's opinion.[2] Based upon material undisputed facts, the Seventh Circuit concluded that Kennedy failed to present a triable issue of pregnancy discrimination under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), based upon her failure to present evidence of intentional discrimination or a *prima facie* case under the *McDonnell Douglas* burdenshifting approach.

As direct evidence, the Seventh Circuit considered one alleged comment by Goldberg, allegedly made at least five months before Kennedy's termination: "[i]f you were my wife, I would not want you working after having children." (App. A at 12-17).[3] Goldberg, the Seventh Circuit concluded, was not

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1. The Seventh Circuit's April 3, 1998 opinion, which is reported at *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716 (7th Cir. 1998), attached as Appendix A to the Petition for Writ of Certiorari, is referred to herein as "App. A at __".

2. The record before the Seventh Circuit is, in limited instances, referred to herein as "R. __"; "Ex. __."

3. The other comment allegedly made by Goldberg that Kennedy "should be home with her kids now, with her child now, that she shouldn't be working" (App. A at 12) was considered by the Seventh Circuit in its analysis of circumstantial, not direct, evidence. (App. A at 16-17 n.2). Moreover, there is no admissible evidence to support Kennedy's assertion that this comment was made "repeatedly." The only admissible evidence on this point is the testimony of Lisa Zielinski, who stated that Goldberg made a comment to the effect that it was a shame that, for financial reasons, Kennedy would have to work after her leave (R. 100-2, Ex. 15 at 96). Zielinski testified that she heard this comment only once (*Id.* at 97).

a decisionmaker with regard to Kennedy's discharge, and the alleged remark, Kennedy admitted, was made while Goldberg and Kennedy were discussing the "joys of children." (App. A at 14; R. 82, Tab 3 at 284-86). The discussion occurred "in a casual setting unrelated to discussions regarding the issues which led to [Kennedy's] dismissal." (App. A at 14). Thus the Seventh Circuit held that the comment was not temporally or causally related to the firm's decision to terminate Kennedy and did not establish an inference of pregnancy discrimination. (App. A at 14-15). In the Seventh Circuit's view, this conclusion was

> reinforced by the fact that Goldberg, after having allegedly made the above remark, was instrumental in facilitating [Kennedy's] return to work by agreeing to create a new part-time associate position in order to accommodate her desire to work when no such position had existed previously.

(App. A at 14).

The balance of Kennedy's claimed "direct evidence" was considered circumstantial evidence by the Seventh Circuit, and evaluated to determine whether it constituted a "mosaic of evidence which, taken together, would permit a jury to infer discriminatory intent." (App. A at 16-17 n.2).[4] Finding no link

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4. Kennedy's recitation of claimed "direct evidence" contains numerous misstatements and unsubstantiated allegations. There is no record support for, and Kennedy did not assert before the district court or the Seventh Circuit, the statement that "Goldberg insisted that [Kennedy's] future employment with the firm be placed on the partner's meeting agenda." (Petition for Writ of Certiorari ("Cert. Pet.") at 5). Additionally, contrary to Kennedy's suggestion in her petition, she was not replaced following her termination. The referenced "male law school graduate" was hired as a litigation associate; (Cont'd)

between the alleged circumstantial evidence and Kennedy's pregnancy, the Seventh Circuit concluded that the alleged circumstantial evidence, like the alleged direct evidence, did not create a triable issue of pregnancy discrimination.

Finally, the Seventh Circuit concluded that Kennedy failed to state a *prima facie* case of pregnancy discrimination under the *McDonnell Douglas* burdenshifting approach. (App. A at 19-22). Because Kennedy failed to present either direct or circumstantial evidence of intentional discrimination and failed to establish a *prima facie* case of pregnancy discrimination under *McDonnell Douglas*, the Seventh Circuit, on April 3, 1998, after oral argument, affirmed the district court's order granting summary judgment in favor of Respondents. (App. A at 26).

REASONS FOR DENYING THE WRIT

Kennedy presents no basis for granting a writ of certiorari. Under the Seventh Circuit's analysis, Kennedy had three shots at creating a triable issue of pregnancy discrimination: (1) direct evidence of intentional discrimination; (2) circumstantial evidence of intentional discrimination; or (3) a *prima facie* case of pregnancy discrimination under *McDonnell Douglas*. Kennedy failed each analysis. (App. A at 25-26). None of these evidentiary approaches depended upon the existence of a "smoking gun" or "admission" of discriminatory intent, as she now suggests.

(Cont'd)

Kennedy was a corporate associate who neither performed nor sought litigation work with the firm. (App. A at 21-22). Thus the firm's hire of a litigation associate neither provided circumstantial evidence of pregnancy discrimination nor provided a basis for the fourth element of a *prima facie* case of pregnancy discrimination under *McDonnell Douglas*, *i.e.* more favorable treatment of a similarly situated individual. (App. A at 21-22).

Distressed at the outcome, Kennedy now disingenuously suggests that the Seventh Circuit applied an inappropriate definition of "direct evidence" by requiring a "smoking gun" or an "admission" of intentional discrimination to create a triable issue. This characterization of the Seventh Circuit's analysis is simply wrong.[5] Consistent with precedent, under the direct method of proof, the Seventh Circuit allowed Kennedy the opportunity to create a triable issue of pregnancy discrimination using either direct or circumstantial evidence, *i.e.* evidence which permits an inference of discriminatory intent.[6]

In addition, Kennedy asks the Supreme Court to compel lower courts to apply the definition of direct evidence described by Justice O'Connor in her concurring opinion in *Price Waterhouse v. Hopkins*, rather than requiring a "smoking gun" or an "admission" of discriminatory intent. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 1804-05 (1989) (O'Connor, concurring) (stray remarks by nondecisionmakers or statements by decisionmakers unrelated to the decisional

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5. Kennedy apparently confuses the direct method of proving intentional discrimination with direct evidence. Under the direct method of proof, as compared to the indirect *McDonnell Douglas* method, a Title VII plaintiff must present either direct or circumstantial evidence of intentional discrimination to create a triable issue of pregnancy discrimination. *Troupe v. May Department Stores Company*, 20 F.3d 734, 736 (7th Cir. 1994). In contrast, the indirect *McDonnell Douglas* burdenshifting method requires no evidence of intent.

6. Kennedy argues that requiring her to meet a "smoking gun" standard of direct evidence is tantamount to holding her to a standard of proof higher than preponderance of evidence. This argument, like others she presents in her petition, illustrates her analytical confusion. As discussed herein, the Seventh Circuit did not hold Kennedy to a "smoking gun" standard. Rather, she was given the opportunity to prove intentional discrimination using either direct or circumstantial evidence. She presented neither; accordingly, her claim failed. It is thus nonsensical for Kennedy to argue that she was held to a higher evidentiary standard when she presented no evidence whatsoever of discrimination.

process not sufficient to shift the burden of persuasion to the employer). Again Kennedy mischaracterizes the Seventh Circuit's decision. Rather than requiring evidence of a "smoking gun" or an "admission" for its direct evidence analysis, the Seventh Circuit incorporated the temporal and causal language of Justice O'Connor's definition. In fact, the Seventh Circuit adopted this definition a number of years earlier, applied the definition to the facts of Kennedy's case, and concluded, *inter alia*, that her alleged direct evidence failed to establish intentional discrimination. Thus, even if the Supreme Court grants certiorari here, the outcome of Kennedy's case will not change. Therefore, Kennedy's petition for a writ of certiorari should be denied.

I.

KENNEDY IDENTIFIES NO BASIS FOR GRANTING A WRIT OF CERTIORARI.

In an attempt to create an issue where none exists, Kennedy would lead this Court to believe that the Seventh Circuit ignores any evidence which requires inferential reasoning in a mixed motives case, thus "compel[ling] a Title VII plaintiff to forfeit her right to proceed under the *Price Waterhouse* mixed motives analysis". (Cert. Pet. at 7). Kennedy's characterization of the Seventh Circuit's analysis is incorrect. As stated, Kennedy had the opportunity to prove intentional discrimination under a *Price Waterhouse* mixed motives analysis using either direct or circumstantial evidence; this analysis was not limited to a quest for a "smoking gun" or an "admission" of discriminatory intent.

Ironically, the Seventh Circuit case cited by Kennedy to support her claim that only "smoking gun" evidence shifts the burden of persuasion to the employer in a mixed motive case in the Seventh Circuit, *Troupe v. May Dept. Stores Co.*, 20 F.3d 734 (7th Cir. 1994), holds exactly the opposite. In *Troupe*, the

Seventh Circuit expressly stated that circumstantial evidence, in addition to or in lieu of direct evidence, is admissible to create a triable issue of intentional discrimination. "[C]ircumstantial evidence is admissible too, to provide a basis for drawing an inference of intentional discrimination." *Id.* at 736.

The Seventh Circuit carefully considered all alleged evidence presented by Kennedy. Recognizing as alleged direct evidence the one comment allegedly made to Kennedy by Goldberg, a nondecisionmaker, at least five months prior to her discharge: "if you were my wife, I would not want you working after having children" (App. A at 14; R. 82, Tab 3 at 284-286), the Seventh Circuit found that the comment was not temporally or causally related to Kennedy's discharge, and "thus does not rise to the level of direct evidence of discrimination." (App. A at 14-15).

Notably, in its direct evidence analysis, the Seventh Circuit applied the definition Kennedy now urges this Supreme Court to formally adopt, *i.e.* the temporal and causal definition of direct evidence described by Justice O'Connor in her concurring opinion in *Price Waterhouse*. In fact, the Seventh Circuit adopted this definition of direct evidence a number of years prior to Kennedy's case. *Troupe*, 20 F.3d at 736.

Following its analysis of Kennedy's direct evidence, the Seventh Circuit proceeded to evaluate the alleged circumstantial evidence presented by Kennedy to determine whether it constituted "a mosaic of evidence which, taken together, would permit a jury to infer discriminatory intent." (App. A at 16-18). This analysis, like the direct evidence analysis, demonstrated that Kennedy could not link the alleged evidence to her pregnancy, thus providing no basis to shift the burden of persuasion to the employer under the *Price Waterhouse* mixed motives analysis. (App. A at 18).

It is not the Seventh Circuit's mixed motive analysis or its *McDonnell Douglas* burdenshifting analysis which failed Kennedy. Rather, it is the lack of any evidence of pregnancy discrimination which doomed her case. Kennedy cannot change that outcome by simply mischaracterizing the clearly detailed analysis of the Seventh Circuit. Because Kennedy presents no basis for granting a writ of certiorari, the Supreme Court should deny her petition.

II.

THE ANALYTICAL FRAMEWORK URGED BY KENNEDY CANNOT CHANGE THE OUTCOME OF HER CASE.

In her petition, Kennedy asks this Court to hold that evidence sufficient to shift the burden of persuasion to the employer in a mixed motives case need not rise to the level of a "smoking gun" or an "admission" of discriminatory intent. But, as discussed above, the Seventh Circuit did not hold Kennedy to such a standard; she was provided with every opportunity to prove discriminatory intent using either direct or circumstantial evidence. She failed. Additionally, Kennedy asks this Court to require lower courts to apply Justice O'Connor's *Price Waterhouse* definition in their direct evidence analyses. The Seventh Circuit applied that definition in Kennedy's case. Thus even if Kennedy prevails in her request to this Court, the outcome of her case will not change. Therefore, the Supreme Court should deny Kennedy's petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Kennedy's petition for writ of certiorari be denied.

Respectfully submitted,

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